

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA**

MINUTE ORDER

DATE: 06/10/2015

TIME: 08:20:00 AM

DEPT: 43

JUDICIAL OFFICER PRESIDING: Kevin DeNoce

CLERK: Tiffany Froedge

REPORTER/ERM: None

CASE NO: **56-2015-00462910-CU-FR-VTA**

CASE TITLE: **Salient Sec Serv vs Agency Arms LLC**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Fraud

EVENT TYPE: Demurrer (CLM) to first amended complaint on behalf of defts

MOVING PARTY: Joe Rai, Michael Parks, Catherine Zafra, Agency Arms LLC, PGT Engineering, Randy Niswander

CAUSAL DOCUMENT/DATE FILED: Demurrer, 05/08/2015

EVENT TYPE: Motion to Strike first amended complaint on behalf of defts

MOVING PARTY: Joe Rai, Michael Parks, Catherine Zafra, Agency Arms LLC, PGT Engineering, Randy Niswander

CAUSAL DOCUMENT/DATE FILED: Motion to Strike first amended complaint, 05/08/2015

APPEARANCES

Jerry Rulsky, counsel, present for Plaintiff(s).

Michael A Morrow, counsel, present for Defendant(s).

At 8:50 a.m., court convenes in this matter with all parties present as previously indicated.

Counsel have received and read the court's written tentative ruling.

All parties submit on the Court's tentative ruling.

Matter submitted to the Court with argument as to Cause of Actions 6 and 7.

The Court finds/orders:

The Court's tentative is adopted as the Court's ruling.

The court's ruling is as follows:

The Court sustains the Demurrer with leave to amend, as to the following causes of action: 1 - Misappropriation of trade secrets, 2 - False designation under 15 USC 1125 (a), 9 - Intentional misrepresentation - PGT and Niswander only, 10 - Omission of material fact - PGT and Niswander only. The Court overrules the Demurrer with respect to the remaining causes of action.

Motion to strike exemplary damages allegations: moot in light of the Court's ruling on the demurrer.

Second Amended complaint to be filed by 7-2-15.

Discussion:

Defendants' demurrer to all causes of action set forth in Plaintiff's first amended complaint.

1 - Misappropriation of trade secrets

""One who seeks protection against the use or disclosure of a trade secret must plead facts showing (1) the existence of subject matter which is capable of protection as a trade secret; (2) the secret was disclosed to the defendant, ... under circumstances giving rise to a contractual or other legally imposed obligation on the part of the discloser not to use or disclose the secret to the detriment of the discloser; and (3) if the defendant is an employee or former employee of the plaintiff ... the facts alleged must also show that the public policy in favor of the protection of the complainant's interest in maintaining the secret outweighs the interest of the employee in using his knowledge to support himself in other employment. ..." (*Diodes, Inc. v. Franzen*, 260 Cal.App.2d 244, 250 [67 Cal.Rptr. 19].)"

(*Cal Francisco Inv Corp v Vrionis* (1971) 14 CA 3d 318, 321-322.)

Plaintiff argues that the requisite allegations are made at paragraphs 14, 27 and 30. Paragraph 14 alleges that Plaintiff had a possessory interest in certain proprietary, confidential and trade secret information including proprietary design materials (sketches, drawings, models and plans in physical and electronic form of Plaintiff's existing and future products); molds of weapon parts; proprietary manufacturing equipment including customized soldering iron tips designed by Plaintiff; proprietary client and vendor lists, marketing plans and materials. Paragraph 27 alleges that the Defendants intend to use and continue using and disclosing Plaintiff's trade secrets to others. Paragraph 23 alleges that Defendants were given access to the trade secrets in their 'respective positions.' Paragraph 30 alleges that Plaintiff has suffered damages.

"Misappropriation" is defined to include "use of a trade secret of another without express or implied consent by a person who: [¶] ... [¶] [a]t the time of ... use, knew or had reason to know that his or her knowledge of the trade secret was: [¶] ... [¶] [a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use." (*Civ. Code*, § 3426.1, subd. (b)(2).) Plaintiff has not pled sufficient facts to establish that the information was acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use nor has Plaintiff alleged facts which would suggest that the Defendants, aside from Agency Arms, were told that they were being given proprietary information so that they could complete their jobs. Plaintiff also fails to identify the nature of the trade secret at issue.

2 - False designation under 15 USC 1125 (a)

"The elements of a Lanham Act § 43(a)2 false advertising claim are: (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce;3 and (5) the plaintiff has

been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products. *Cook, Perkiss and Liehe, Inc. v. Northern Cal. Collection Serv., Inc.*, 911 F.2d 242, 244 (9th Cir.1990); accord *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 (D.C.Cir.1990). To demonstrate falsity within the meaning of the Lanham Act, a plaintiff may show that the statement was literally false, either on its face or by necessary implication, or that the statement was literally true but likely to mislead or confuse consumers. (*Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 943, 946 (3d Cir.1993) ("Castrol").)

(*Southland Sod Farms v Stover Seed Co* (2002 9th cir) 304 F 3d 1134, 1139, footnote omitted.)

Plaintiff alleges in paragraphs 33 and 34 that by offering their own weapons, handguns and gunslides that look identical to Plaintiff's, Defendants have engaged in false designation of origin. Plaintiff alleges that there would be confusion as to Plaintiff's association or connection with Agency Arms products. More specific facts as opposed to conclusive facts need to be alleged.

9 - Intentional misrepresentation - PGT and Niswander only

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 676, p. 778; see also Civ. Code, § 1709; Hunter, supra, 6 Cal.4th 1174, 1184; *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1108 [252 Cal.Rptr. 122, 762 P.2d 46].)"

(*Lazar v Superior Court* (1996) 12 C 4th 631, 638.)

Fraud must be pled with specificity and necessitates pleading facts demonstrating who said what when, to whom, where and by what means. Where a corporation is involved, the plaintiff must allege the name of the person who made the representation and their authority to speak on behalf of the corporation. (*Lazar v Superior Court* (1996) 12 C 4th 631, 645.)

Plaintiff alleges that Defendant represented that he had not previously manufactured weapons for other gun manufacturers and had no present intent to do so in the future and that neither he nor PGT would manufacture any parts for other gun manufacturers without disclosing to the Plaintiff the intent to do so and without either returning to Plaintiff the entirety of its proprietary materials or entering into additional agreements relating to safekeeping and non disclosure of Plaintiff's trade secrets. Plaintiff does not allege when in 2012 nor does Plaintiff, a corporation itself, allege who Niswander made his representations to.

10 - Omission of material fact - PGT and Niswander only

"[T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage."

(*Marketing West, Inc v Sanyo Fisher (USA) Corp* (1992) 6 CA 4th 603, 612-613.)

Plaintiff alleges, for this cause of action, that Niswander actively concealed his intent to use Plaintiff's proprietary information to form Agency Arms. Plaintiff fails to allege specific facts as

to the dates and identity of who said what or specific facts which would give rise to a duty to inform Plaintiff of of work for another gun manufacturer.

Formal order to be submitted by Mr. Morrow.

As to Demurrer re: Cause of Actions 6 and 7:

The Court takes this matter under submission as of 06/10/2015.